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94-19

IN THE

Supreme Court of the United States

October Term, 1994

LAURENCE G. WATERS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's involuntary hospitalization constituted a commitment to a mental institution within the meaning of Title 18 U.S.C. § 922(g)(4) thereby rendering his possession of a firearm illegal?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Laurence J. Waters, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered in the above entitled proceedings on April 7, 1994.

OPINIONS BELOW

The opinion of the District Court for the Northern District of New York (Munson, S.J.) is reported at 786 F.Supp. 1111 (N.D.N.Y. 1993). It is reproduced in Appendix A, infra.

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It is reproduced in Appendix B, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was dated and entered April 7, 1994.

The jurisdiction of this Court to review that judgment by a writ of certiorari is conferred by Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this petition are The United States Constitution Second, Fifth, and Fourteenth Amendment. The pertinent text is set forth in Appendix C, infra.

STATEMENT OF THE CASE

On September 25, 1992, petitioner entered a conditional plea of guilty pursuant to Federal Rules of Criminal Procedure, Rule 11(a)(2), to the crime of POSSESSION OF A FIREARM AFTER HAVING BEEN COMMITTED TO A MENTAL INSTITUTION (90-91, 106)[1].

The plea of guilty followed the denial of his pre-trial motion to dismiss because he was not committed to a mental institution within the provisions of 18 U.S.C. § 922(g)(4) (10-56, 70-

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[1]Reference is to the Petitioner's Joint Appendix that was filed in the Court of Appeals.

77; 57-69, 78-83).

Petitioner was sentenced by Senior United States District Court Judge Howard G. Munson, on January 8, 1993, to serve a two (2) year term of probation, to pay a fine of $2,500, to participate in a mental health treatment program as directed by the Probation Office, and to pay a special assessment of $50 (117-118, 122-126).

On April 7, 1994, the United States Court of Appeals for the Second Circuit affirmed petitioner's conviction finding that petitioner's involuntary hospitalization was a commitment within the provisions of 18 U.S.C. § 922(g)(4).

REASONS FOR GRANTING THE WRIT

The Court of Appeals acknowledged that the case at bar presented a novel issue for the Second Circuit as to whether an involuntary hospitalization pursuant to New York Mental Hygiene Law constitutes a commitment to a mental

institution within the meaning of 18 U.S.C. § 922(g)(4). This Court therefore will have an opportunity to clarify the issue particularly since there is a conflict with the Fifth and Eighth Circuit, which have addressed the same issue, although with different results (United States v. Giardina, 861 F.2d 1334 [5th Cir. 1988]; United States v. Hansel, 474 F.2d 1120 [8th Cir. 1973]). The comparable state statutes in question in the Fifth and Eighth Circuit, however, were extremely similar to the New York Statute.

Moreover, this Court will have the opportunity to evaluate the New York Mental Hygiene Law which has changed over the years to eliminate the stigma of being committed to a Mental Institution without it being by Court Order, by eliminating the term "commitment" from the statutes relating to the hospitalization of individuals under the Mental Hygiene Law.

The issue is one which is ripe today with all the changes in the Gun Control Act, and one

which would have many ramifications in the future with the tighter regulations and more voracious enforcements contemplated.

PETITIONER HAS NOT BEEN COMMITTED TO A MENTAL INSTITUTION WITHIN THE PROVISIONS OF 18 U.S.C. § 922(g)(4).

Petitioner was charged with violating Title 18 U.S.C. § 922(g)(4) which states in pertinent part that it is unlawful to knowingly possess a firearm in or affecting interstate commerce after having previously been committed to a mental institution. Therefore, one element of the crime is that petitioner must have been committed to a mental institution prior to his alleged possession of firearms on May 17, 1991 (7-9) (see, 18 U.S.C. § 922(g)(4)).

The legislative history of 18 U.S.C. § 922(g), specifically House Report No. 1577 (1968 U.S. Code Cong. and Adm. News 4410, 4421), reveals that it would be unlawful to possess a

firearm if one had been adjudicated in any court as a mental defective or had been committed under court order to any mental institution (emphasis added). However, before the House Bill became law it was revised by Conference Report No. 1956 (1968 U.S. Code Cong. and Adm. News 4426, 4429-4430) which adopted the broader restrictions and in the case of "mental defectives and committed persons does not require that there be prior action by a court inasmuch as mental boards and commissions constitute the adjudicating or committing authority in some jurisdictions".

Therefore, it was the legislative intent that the provisions of 18 U.S.C. § 922(g)(4) be applicable to those committed by court order, mental boards, or commissions. Neither the statute nor the legislative history defines the term "commitment". Only the Fifth Circuit has construed the term "commitment" in the context of this statute (see, United States v. Giardina, 861 F.2d 1334 [5th Cir. 1988]).

The sole issue in Giardina (supra), as in the case at bar, was whether the defendant's involuntary hospitalization constituted a commitment to a mental institution under 18 U.S.C. § 922(g)(4). In seeking to answer this question, the Fifth Circuit in Giardina (supra at 1335), held that whether the defendant "was committed to a mental institution is a question of federal law, but in making that determination [the Court] may seek guidance from state law". That court further held that if the defendant is found not to have been committed under state law then the question becomes is "that answer consistent with federal policy" (Giardina, supra at 1335).

The Louisiana Mental Health Law in issue in Giardina (supra at 1336), avoids the use of the words "commitment" and "committed" and uses the words "admission" and "detained", while using "commitment" for the formal procedure of judicial commitment. Giardina was admitted under an equivalent Two-Physician Certificate

for an evaluation and could be confined under the Louisiana statute for a maximum of fifteen days without a judicial commitment (Giardina, supra at 1336).

As such, the Fifth Circuit in Giardina (supra at 1336), found that this physician certification procedure did not constitute a commitment under Louisiana law. In assessing whether this conclusion was consistent with federal policy, the court in Giardina (supra at 1337), noted that the general rule is "that criminal statutes are to be strictly construed and give to '[committed]' its narrow meaning...," citing Yates v. United States, 354 U.S. 298, 310 (1957), and as such there is nothing in 18 U.S.C. 922(g) which "indicates an intent to prohibit the possession of firearms by persons who had been hospitalized for observation and examination, where they were found not to be mentally ill."

In United States v. Hansel (474 F.2d 1120, 1121 [8th Cir. 1973]), the Eighth Circuit had to

determine whether that defendant had, in fact, been "adjudicated as a mental defective or committed to any mental institution" under 18 U.S.C. § 922(h)[2].

Hansel was found to be mentally ill by the Board of Mental Health of Lancaster County and ordered hospitalized by the Board for evaluation and observation (Hansel, supra). After two weeks Hansel was placed on convalescent leave and was formally discharged shortly thereafter (Hansel, supra at 1122).

The Eighth Circuit in Hansel (supra at 1123), found that Hansel was not committed within the meaning of 18 U.S.C. § 922 because the superintendent of the mental hospital did not determine that Hansel was mentally ill and should therefore be committed, although he could have kept Hansel hospitalized for sixty days before making such determination. The Eighth

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[2]Hansel was charged with a violation of 18 U.S.C. § 922(h) of the 1968 Gun Control Act which was consolidated into subdivision (g) in the 1986 Gun Control Act (Hansel, supra).

Circuit in Hansel (supra at 1123), further found that there was nothing in 18 U.S.C. § 922 to indicate an intent to prohibit the possession of firearms for persons hospitalized in a mental institution but not found to be mentally ill.

In the case at bar, petitioner like Giardina, was admitted to the St. Lawrence Psychiatric Center for evaluation, observation, and treatment on November 8, 1979, pursuant to New York Mental Hygiene Law § 9.27 (13).

New York Mental Hygiene Law § 9.27 provides for the involuntary "admission" of an alleged mentally ill patient upon the certification of two physicians. All that is required is certification of an allegation of mental illness; a determination of mental illness is not required (see New York Mental Hygiene Law § 9.27(c)).

The New York Mental Hygiene Law does not use the term "commitment" but rather the term "admission" and when discussing court extension of an involuntary admission it uses the term

"retention" (New York Mental Hygiene Law §§ 9.27, 9.33). If after the initial period of sixty days, the director of the institution determines that the patient is in need of hospitalization, then the director may apply to the court for an order authorizing retention for a specified period (New York Mental Hygiene Law § 9.33).

A review of the New York Mental Hygiene Law reveals that from 1927 until 1964 the applicable article relating to the hospitalization of the mentally ill was titled "Commitment, Custody, Maintenance, and Discharge of the Insane" (1964 New York Law, c. 738).

In 1964, the New York Legislature changed the title of the applicable article to "Hospitalization of Mentally Ill" (1964 New York Law, c. 738).

However, in 1944, the New York Legislature amended the applicable provisions of the Mental Hygiene Law by substituting "mentally ill" for "insane" and "certification" for "commitment"

when referring to court action (1944 New York Law, c. 665, § 1)[3].

As such, the legislative history reveals that a formal commitment was intended only after court certification. It should be noted that the House Bill regarding the Gun Control Act of 1968 originally envisioned commitments to a mental institution to occur only upon court order (see House Report No. 1577, 1968 U.S. Code Cong. and Adm. News 4410, 4421). The broader restrictions were then adopted to also include

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[3]The Bill Jacket for 1944 New York Law, c. 665 reveals that the then Mental Hygiene procedures were "outmoded and stigmatize[d] patients." It was the intent of the legislature that if within the initial sixty-day hospitalization period the patient was not retained by the court, that patient would be "freed from the real or imagined stigma of having been institutionalized for mental care." Certifications had to be presented to the court to prevent the "dumping of patients" into mental institutions. The extension of the initial involuntary hospitalization to sixty days was to allow the institution an appropriate period of observation to determine if a mental illness existed, whether retention was necessary, and to give the court more facts upon which to rest its certification.

commitments by mental boards (as in Hansel, supra) or by commission (see Conference Report No. 1956, 1968 U.S. Code Cong. and Adm. News 4426, 4429-4430).

In the instant case, petitioner was not "committed" by a mental board, a commission, or by court order, but rather was "admitted" by the medical decision of two physicians (13).

Given the requirement that criminal statutes be "strictly construed" and that terms be given their narrow meanings, the only interpretation that may be found in the case at bar is that petitioner was never "committed" to a mental institution (see Yates, supra at 310; Giardina, supra at 1337).

This determination that no "commitment" existed in the instant case is even more compelling when one looks at the facts of this case, in that petitioner was released on convalescent out-patient care (as in Hansel, supra) less than one month after he was admitted to the St. Lawrence Psychiatric Center (13).

Appellant's status changed to voluntary on January 7, 1980, 60 days after he was initially admitted (13, 103). Moreover, while petitioner was receiving in-patient care he was allowed to go home on weekends (a fact certainly not indicative of dangerousness to himself or others) (103)[4]. A judicial retention, moreover, was never obtained (13).

The letter from the St. Lawrence Psychiatric Center, dated May 15, 1991, is also consistent with the determination that petitioner was not "committed" to a mental institution, as Dr. Lee Hans specifically stated that petitioner was "admitted" to their facility and not "committed" to their facility (13).

The District Court's and Circuit Court's Decisions are erroneous because they both found that the current New York Mental Hygiene Law §

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[4]It should be noted that during this time of "admission" to St. Lawrence Psychiatric Center petitioner was a federally licensed firearms dealer (Pre-Sentence Report). He initially obtained his license in 1977.

9.27 does not require court involvement to effectuate a formal commitment, although the District Court acknowledged that before the 1964 revision of the New York Mental Hygiene Law, court involvement was necessary (Appendix A, District Court Decision, pp. A-4-5; Appendix B, Second Circuit Decision, pp. B-9-12). The District Court and Circuit Court further held that enactment of New York Mental Hygiene Law § 9.27(h) refers to the Two-Physician procedure described in the body of § 9.27 as a "commitment" (Appendix A, pp. A-6-7; Appendix B, pp. B-7-10).

It is respectfully submitted, that this inadvertent use of the term "commitment" in a subsection that refers to alcohol and drug abuse is not meant to make petitioner's Two-Physician Certification pursuant to Mental Hygiene Law § 9.27 a commitment, and like Giardina (supra at 1336, fn. 3), was probably an oversight of the legislature when adding an additional subsection, or the use of a familiar cognomen.

In any event, no where other than paragraph (h) of New York Mental Hygiene Law § 9.27 is the term "commitment" used, and even in paragraph (h) "commitment" is restricted to admissions by those suffering from alcohol and substance abuse, and more importantly refers to "commitment' of these persons examined and determined to be mentally ill (New York Mental Hygiene Law § 9.27(h)). However, when one looks at New York Mental Hygiene Law § 9.27 it is clear that no determination of mental illness is necessary for an involuntary admission under this section, but rather all that is needed is an allegation of mental illness (see New York Mental Hygiene Law § 9.27(c)).

The New York courts, moreover, use the term "commitment' as the determination obtained after a hearing has been had due to either the institution seeking to retain the patient for a longer period of time than that proscribed by statute, or the patient requesting a hearing in order to be released from the involuntary

confinement after a judicial order of retention was issued (Boggs v. NYC Health and Hospitals Corp., 70 N.Y.2d 972 (1988); Fhagen v. Miller, 29 N.Y.2d 348 (1972); People ex rel. Powell v. Warden, Kings County Hospital, 73 A.D.2d 654 (1979)).

In Boggs (132 A.D.2d 340 (1987)), the patient was involuntarily admitted pursuant to New York Mental Hygiene Law § 9.39. After one day she requested a hearing which was provided (Boggs, 132 A.D.2d supra). It was after this hearing that Boggs was in fact committed (Boggs, 132 A.D.2d supra).

In Fhagan (supra at 352), the New York Court of Appeals refers to admissions pursuant to Section 72 (the equivalent of New York Mental Hygiene Law § 9.27) not commitments pursuant to Section 72. The New York Court of Appeals further states:

> And finally, his retention as a Section 72 patient beyond 60 days is subject to periodic court review and - simply upon request of the patient or of a friend or relative - a court hearing and review of an order of

> retention may be had, including a trial by jury, if demanded, on the question of his mental illness. A mentally ill person, so committed and hospitalized, certainly may not be said to have been deprived of his liberty without due process of law (emphasis added) (Fhagan, supra at 356).

It is therefore, clear from the language and context in Fhagan (supra), that a commitment occurs only after there has been a court review.

Likewise, in People ex rel. Powell (supra), commitment is limited to court approved confinements. The court states: "Under the generally applicable statute for commitments of the mental ill or retarded, the initial confinement is not pursuant to New York Mental Hygiene Law § 9.27 and refers to commitments when speaking of the determination resulting from an Article 9 due process of law challenge, i.e. through a hearing (People ex rel. Powell, supra).

Essentially one may analogize the procedures used in New York Mental Hygiene Law § 9.27 to the procedures of admission to a

hospital. When one goes to the emergency room of a hospital with an alleged problem, one is not automatically admitted to the hospital. In fact, after observation, treatment, and care, one usually gets sent home.

In the case at bar, petitioner though admitted to the institution involuntarily for observation, care, and treatment upon an allegation of mental illness, was allowed to leave every weekend, which is not indicative of the type to individual that is to be encompassed by the 1986 Gun Control Act.

As such, the next issue is whether this determination that there was no "commitment" of petitioner in New York would be consistent with federal policy (see Giardina, supra at 1335). As in Giardina (supra at 1337), there is no indication in the statute (18 U.S.C. § 922(g)) of an intent to prohibit the possession of firearms by a person who had been hospitalized under an allegation of mental illness by the decision of two physicians, where no

determination of mental illness requiring "commitment" had been found and where petitioner was allowed to go home during his hospitalization.

The District Court and the Circuit Court found that when petitioner was involuntarily confined to the mental institution under New York Mental Hygiene Law § 9.27, he was clearly dangerous to society, and that this is exactly the type of individual 18 U.S.C. § 922(g)(4) intended to cover (Appendix A, pp. A-9-10; Appendix B, pp. B-13-17).

It is respectfully submitted, that the District Court's and Circuit Court's reasoning ignores the fact that while admitted to the mental institution, and allegedly considered dangerous to society, petitioner was allowed to go home on weekends (13, 103). This type of treatment is certainly not consistent with dangerousness, and as such, the Courts' reasoning must fail.

Therefore, a material element of 18 U.S.C.

§ 922(g) that petitioner had been committed to a mental institution has not been met.

In any event, the meaning of commitment to a mental institution within the 1986 Gun Control Act should be defined, or at least given direction by this Court, especially in light of the recent trend to eliminate commitments from involuntary hospitalizations of patients without a Court-ordered retention in New York State; the more prohibitive federal Gun Control laws being passed; and the expected increase in enforcements of violations of the Gun Control laws. Individuals buying weapons should be able to know whether they are prohibited from possessing them, and the prohibitions should be uniform throughout the States (see e.g., Beecham v. United States, ___ U.S. ___ [5/16/94]).

CONCLUSION

THE PETITION FOR CERTIORARI

SHOULD BE GRANTED.

Respectfully submitted,

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Dated: June 20, 1994

APPENDIX A

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UNITED STATES of America

v.

Laurence WATERS, Defendant.

No. 91-CR-325.

United States District Court,
N.D. New York.

March 17, 1992.

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Gary Sharpe, Acting U.S. Atty. (John Brunetti, of counsel) Syracuse, N.Y., for U.S.

Marsha A. Hunt, Syracuse, N.Y., for defendant.

MEMORANDUM-DECISION AND ORDER

MUNSON, Senior District Judge.

Presently before the court are defendant's omnibus pre-trial motions. Oral argument was heard on February 14, 1992 in Syracuse, New York.

I. BACKGROUND [1]

Defendant is charged with five counts of knowingly possessing firearms in or affecting interstate commerce, having previously been committed to a mental institution, in violation of the Gun Control Act of 1968, 18 U.S.C. § 922(g)(4), as amended by the Firearm Owner's Protection Act of 1986, Pub.L. No. 99–308, 100 Stat. 449, 452 (1986).

* * *

REMAINDER OF MEMORANDUM DECISION AND ORDER DEALING WITH SUPPRESSION OF EVIDENCE, BRADY AND FURTHER MOTIONS EXCLUDED.

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Defendant now moves for an order: (1) dismissing the indictment on the ground that an essential element of the crimes charged is not pleaded, (2) suppressing any tangible evidence recovered from the search due to defects in the search warrant, (3) suppressing statements made by defendant to Agent Maxwell, (4) requiring

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1. A portion of the factual background is taken from the government's affidavit in support of a search warrant of defendant's residence. The facts are set forth as if they are true because they are the only general statement of facts provided to the court in this case. Defendant offers no general factual summary, although he does refer to some facts in the context of his omnibus motions.

the government to provide *Brady* material, and (5) permitting defendant to make further motions. Defendant had also moved for a bill of particulars, but withdrew that motion based on recent government disclosures.

II. DISCUSSION

A. *Motion to Dismiss*

[1] Defendant moves to dismiss the indictment on the ground that there is no evidence to establish that he was previously "committed" to a mental institution as required by 18 U.S.C. § 922(g)(4). Specifically, defendant contends that he was never detained in an institution by judicial order, something he contends is a prerequisite to establishing actual commitment.

Section 922(g)(4), under which defendant is charged in each count of the indictment, provides in pertinent part:

> It shall be unlawful for any person—
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The statute does not define the term "committed," nor has any court in this circuit addressed the issue of whether placement

in a mental institution pursuant to § 9.27 of the New York Mental Hygiene Law is a "commitment" for purposes of 18 U.S.C. § 922(g)(4).

Defendant contends that the consistent use of the term "admission" and the conspicuous absence of the term "commitment" in § 9.27 clearly indicates that involuntary placement in a mental institution under a two-physician certificate is not a formal "commitment" under 18 U.S.C. § 922(g)(4). Defendant argues that the principles set forth in *United States v. Giardina*, 861 F.2d 1334 (5th Cir.1988) and *United States v. Hansel*, 474 F.2d 1120 (8th Cir.1973), cases which found that hospitalization under Louisiana's and Nebraska's mental health laws did not constitute commitments, are equally applicable under New York law.

The government counters that an involuntary admission by a two-physician certificate under New York Mental Hygiene Law § 9.27 is a formal "commitment" as defined by 18 U.S.C. § 922(g)(4). According to the government, it was the intent of the New York Legislature under Article 9 of the Mental Hygiene Law to provide for

commitments of patients in civil proceedings without judicial involvement. The government further contends that facts involved in *Giardina* and *Hansel* are clearly distinguishable from the facts of the case at bar. Last, the government argues that, given New York's statutory scheme, it was Congress's intent to include a person such as defendant within the proscription of 18 U.S.C. § 922(g)(4).

Whether defendant was "committed" to a mental institution is a question of federal law, but in making that determination, the court must consider state law. *See Giardina*, 861 F.2d at 1335 (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111–12, 103 S.Ct. 986, 991, 74 L.Ed.2d 845 (1983)). Once a determination based on state law is made, the court must then consider whether that outcome is consistent with federal policy. *Id.*

Section 9.27 of the New York Mental Hygiene Law ("MHL") provides that a director of a mental health facility may receive and retain a person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for admission. Section 9.31 provides that a patient who has been involuntarily admitted on a two-physician certification, or a person acting on the patient's behalf, may request a hearing before a

judge within sixty days of the date of admission. The purpose of the hearing is to "determine the need for involuntary care and treatment." Also, the director of the mental facility may convert the involuntary admission to a voluntary or informal admission at any time during the patient's stay, provided the director finds the patient suitable for the change in status and the patient is willing to apply for a voluntary stay. *See* MHL § 9.23(a).

Once a patient is involuntarily admitted as provided by § 9.27, the director of the facility may retain the patient, without any further action, for a period of sixty days from the date of admission or thirty days from the issuance of a court order denying an application for release. *See* MHL § 9.33. If the director determines that such patient requires retention beyond the sixty-day period and the patient does not agree to remain in the hospital as a voluntary patient, then the director must apply to the supreme court or the county court in the county where the hospital is located for an order authorizing continued retention. *See* MHL § 9.33(a).

In considering whether a two-physician admission is a "commitment" under the current version of § 9.27 of the MHL, the court will first analyze New York's original statutory scheme, which provided for "admission on court commitment." *See Giar-*

dina, 861 F.2d at 1335 (court reviewed Louisiana's prior statutory scheme to understand present statute). Section 74 of the Mental Hygiene Law, originally enacted in 1927 and amended in 1933, read as follows:

> A person alleged to be insane, and who is not in confinement on a criminal charge, may be committed to and confined in an institution for the custody and treatment

> of the insane, upon an order made by a judge ... adjudging such person to be insane, upon a certificate made by two qualified examiners, accompanied by a verified petition therefor, or upon such certificate and petition, and after a hearing, as provided in this section.

1933 N.Y.Laws 395, at 931. The term commitment is consistently used in the statute to refer to this "admission by court commitment." In 1964, the legislature radically overhauled the Mental Hygiene Law, abolishing judicial certification of involuntary patients, and "replacing that procedure with a system of admissions which are initially medically-determined, but which are followed by notice and the opportunity for court review to safeguard the constitutional rights of patients." Memorandum of Governor Nelson A. Rockefeller, 1964 N.Y.Laws 738, at 1968 (McKinney). "One of the most significant aspects of the re-

vised procedure calls for a speedy *commitment* of the involuntary patient based solely on a medical determination of the individual's need for hospitalization." Recent Statutes, *INSANE PERSONS—New York Statute Replaces Judicial Certification of Involuntary Mental Patients with a System of Medically Determined Commitments. N.Y. Mental Hygiene Law §§ 72–74 (Supp.1964)*, 43 Tex.L.Rev. 599 (1965) (emphasis added). Thus, New York's prior statutory scheme strongly indicates that the current version of the Mental Hygiene Law, which was recodified in 1972 from Article 33 to Article 9, does not require court involvement to effectuate a formal commitment.

In addition to the prior statutory scheme, at least one New York court has indicated that Article 9 was intended to provide for commitments of patients in civil proceedings without judicial involvement. *See People ex rel. Powell v. Warden, Kings County Hosp.*, 73 A.D.2d 654, 422 N.Y.S.2d 726, 728 (2d Dep't 1979). In *Powell*, the Second Department described the role of the judiciary under Article 9 as "restricted, for the most part, to a review of the discretion exercised by the autonomous departmental office[ ] of mental health...." *Id.* 422 N.Y.S.2d at 728. The court also stated that § 9.27 "provide[s] for commitment without judicial involvement." *Id.* 422 N.Y.S.2d at 729.

Yet another indication that the legislature intended the two-physician certification procedure to be a formal commitment is the fact that in 1977 the New York Legislature added subsection (h) to § 9.27. The new subsection specifically referred to the two-physician procedure described in the body of § 9.27 as a "commitment." *See* 1977 N.Y.Laws 978, § 7.

Despite these facts, defendant maintains that the reasoning in both *Giardina* and *Hansel* is applicable to the case at bar. The court disagrees.

In *Hansel*, the Eighth Circuit held that defendant's hospitalization, pursuant to an order of the Board of Mental Health of Lancaster County, Nebraska, was not a commitment within the meaning of the Gun Control Act. *Hansel*, 474 F.2d at 1120. In that case, the defendant was hospitalized pursuant to 5 Neb.Rev.Stat. § 83–328 (1971). He was examined by one physician, found not to have a serious mental disorder and was subsequently released on "convalescent leave" after two weeks. *Id.* at 1122. Nebraska had a two-step procedure for admitting persons to a mental hospital. The first step provided for a temporary hospitalization of an individual for psychiatric observation if the County Mental Health Board ("Board") made a determination that such person was mentally ill and in need of hospitalization. Second, if dur-

ing this period of observation, the superintendent of the hospital determined that the patient was mentally ill and should be committed, the patient could be committed to a hospital *only if* the superintendent certified his determination to the Board. *Id.* at 1123 (citing Neb.Rev.Stat. § 83–328) (emphasis added).

Since there was evidence that the superintendent of the hospital never filed certification with the Board as prescribed by 5 Neb.Rev.Stat. § 83–328, the court found that the commitment procedure was never completed. Therefore, the court held that the defendant's hospitalization pursuant to

the Nebraska statute was a "period of observation" and it was not a "commitment" within the meaning of the Gun Control Act. *Id.* at 1123.

Unlike the Nebraska procedure at issue in *Hansel*, neither § 9.27, nor any other provision of the New York Mental Hygiene Law, indicates that the § 9.27 commitment is not complete prior to a judicial order. In fact, a patient could be detained indefinitely under the Mental Hygiene Law, first under § 9.27 and then under § 9.23(a), without ever having to go before a judge. Therefore, the decision has no applicability to the case at bar.

In *Giardina*, the defendant was involuntarily admitted to a mental hospital pursuant to the emergency certificate procedures set forth in the Louisiana Mental Health Law. Defendant was detained at the hospital for a period of two weeks. Defendant was then released. Three years later the defendant purchased firearms and he was subsequently indicted for two counts of violating 18 U.S.C. § 922(g)(4). The trial court ruled that defendant had been "committed" as defined by § 922(g) by reason of his involuntary admission to a mental hospital. The Fifth Circuit reversed. In reviewing the Louisiana Mental Health Law, the court noted that it avoided the use of the terms "committed" or "commitment," except in a section which detailed procedures for obtaining a formal judicial commitment. *Giardina*, 861 F.2d at 1336. Under the facts in that case, the court determined that defendant could not be detained beyond the two-week period unless a judicial commitment order was obtained. No such order was obtained, leading the Fifth Circuit to its conclusion that defendant had not been "committed" for purposes of 18 U.S.C. § 922(g)(4).

The Louisiana statute at issue in *Giardina*, unlike § 9.27 of the New York Mental Hygiene Law, only authorizes detention of the patient for a short period of time (fif-

teen days).[2] More importantly, the Louisiana statute specifically requires a judicial commitment to retain the patient for a longer period. No such requirement is found in the New York statute. This court therefore concludes that both *Hansel* and *Giardina* are distinguishable from the case at bar. Based on the discussion set forth *supra* at 1114–1115, the court holds that the procedure set forth in § 9.27 constitutes a "commitment" within the meaning of 18 U.S.C. § 922(g)(4).

The court must next consider whether such a conclusion comports with federal policy. Congress' intent in enacting the relevant portions of the Gun Control Act was "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." *Dickerson*, 460 U.S. at 112, 103 S.Ct. at 991 (quoting *Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 920, 63 L.Ed.2d 198 (1980)); *see also Huddleston v. United States*, 415 U.S. 814, 824–29, 94 S.Ct. 1262, 1268–71, 39 L.Ed.2d 782 (1974) (quoting the history of the legislation which became the

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2. This is similar to MHL § 9.39, which provides that the director of a hospital may retain a person in a hospital for a period of 15 days, if that person is alleged to have a mental illness likely to result in serious harm to himself or others.

Gun Control Act of 1968). When defendant was involuntarily confined to the mental institution under § 9.27, he was clearly considered dangerous to society. *See Project Release v. Prevost*, 722 F.2d 960, 973 (2d Cir.1983) (section 9.27 only permits the involuntary confinement of dangerous individuals who cannot "survive in the community"). When the involuntary admission was converted to a voluntary admission pursuant to § 9.23, defendant was still plagued by mental illness and therefore continued to be a threat to society. This person is precisely the type of individual whom Congress determined poses a potential threat to society by possessing firearms and whom Congress prohibited from possessing firearms under the Gun Control Act.

It is undisputed that 18 U.S.C. § 922(g)(4) does not require "judicial" commitment to come under the ambit of the statute. *See* Conf.Rep. No. 1956, 90th Cong., 2d Sess., *reprinted in* 1968

U.S.Code Cong. & Admin.News 4426, 4429–30; *see also Giardina*, 861 F.2d at 1337 (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983)). Rather, what is required is a "formal" commitment, which, in

the instance of New York, can be accomplished through a two-physician certification.

Having concluded that a formal "commitment" of defendant under § 9.27 did occur in the case at bar, defendant's motion to dismiss the indictment on this basis is hereby denied.

* * *

REMAINDER OF MEMORANDUM DECISION AND ORDER DEALING WITH SUPPRESSION OF EVIDENCE, BRADY AND FURTHER MOTIONS EXCLUDED.

1120

III. CONCLUSION

Based on the foregoing reasons, defendant's motions to dismiss, to suppress tangible evidence, and to suppress statements are denied.

It Is So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 325—August Term 1993

(Argued: October 7, 1993 Decided: April 7, 1994)

Docket No. 93-1039

UNITED STATES OF AMERICA,

Appellee,

—v.—

LAURENCE G. WATERS,

Defendant-Appellant.

Before:

PIERCE, MINER and ALTIMARI,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Howard G. Munson, *Judge*) in which the appellant was convicted of possession of a firearm after having been

committed to a mental institution, in violation of 18 U.S.C. § 922(g)(4) (1988).

Affirmed.

ANDREW BAXTER, Assistant United States Attorney, Syracuse, N.Y. (Gary L. Sharpe, United States Attorney for the Northern District of New York, Michael C. Olmsted, Assistant United States Attorney, Syracuse, N.Y., of counsel), *for Appellee*.

JOHN A. CIRANDO, ESQ., Syracuse, N.Y. (D.J. & J.A. Cirando, Esqs., Patrick J. Haber, Ivette Iza Zenner, Syracuse, N.Y., of counsel), *for Defendant-Appellant*.

PIERCE, *Circuit Judge*:

Laurence G. Waters appeals from a January 8, 1993 judgment of conviction and sentence of the United States District Court for the Northern District of New York (Howard G. Munson, *Judge*). On November 13, 1991, Waters, having once been committed to a mental institution, was charged with several counts of possession of a firearm in violation of 18 U.S.C. § 922(g)(4) (1988). On September 25, 1992, Waters pleaded guilty to Count One of the indictment. On January 8, 1993, he was sentenced to serve a two-year term of probation, fined $2,500 and a special assessment of $50, and ordered to participate in a

mental health treatment program. Waters appeals from the conviction and sentence.

BACKGROUND[1]

On November 13, 1991, Waters was indicted by a federal grand jury in the Northern District of New York on five counts of violating the federal gun control statute. The indictment charged that on or about May 17, 1991, Waters "knowingly possessed a firearm in or affecting interstate commerce . . . having then previously been committed to a mental institution." The sequence of events leading to the indictment began when Waters sent two letters to the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") between 1989 and 1991 which claimed knowledge of the location of weapons and firearms.[2] Upon receipt of the letters, the ATF commenced an investigation. On May 8, 1991, an ATF special agent interviewed Waters at his residence. During the interview, Waters displayed a cache of weapons to the agent: six rifles, three shotguns, one machine gun, and a large quantity of ammunition. Waters also discussed subversive activities, espionage, the Central Intelligence Agency, and "the company." After the interview, Waters sent a letter to the ATF in which he stated: "ATF regulations concerning in the service of the gov. related to IRS registered AFFIL, and immagration [sic] computer code name concerning destructive devices that control law."

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1 The statutory language from the New York Mental Hygiene Law cited herein, located in the 1988 edition of McKinney's, published by West Publishing Company, is identical to the statutory language in the previous 1978 edition of the law that was in effect when Waters was admitted to a mental health facility in 1979.

2 In 1977, Waters received a federal license to deal in firearms. In 1981, however, the Government discontinued renewing his license.

Following the interview with Waters, the ATF discovered that he had been involuntarily hospitalized at St. Lawrence Psychiatric Center on November 8, 1979, on a Two-Physicians Certificate, in accordance with New York Mental Hygiene Law § 9.27(a), which states:

> The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person. The examination may be conducted jointly but each examining physician shall execute a separate certificate.

There is no indication that Waters, at that time, challenged his involuntary hospitalization, although § 9.31(a) of the Mental Hygiene Law provides that anyone involuntarily admitted pursuant to medical certification may request a hearing on the question of the need for involuntary care and treatment "at any time prior to the expiration of sixty days from the date of involuntary admission of [the] patient." He was placed on "Convalescent Care" status on December 5, 1979. On January 7, 1980, sixty days after he had been admitted to the facility, Waters requested that his status be converted to voluntary status, pursuant to § 9.23(a), which provides that the director of a mental facility shall convert a patient from involuntary status to voluntary status as long as she is "suitable and willing to apply therefor." He was released seven months later, on August 27, 1980. Following the ATF investigation, a federal grand jury indicted Waters on November 13, 1991, for violation of the federal Gun Control Act in that he possessed firearms after having been committed to a mental institution, in violation of 18 U.S.C. § 922(g)(4), which states that it shall be unlawful for anyone

> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
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> . . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

On January 15, 1992, Waters moved to dismiss his indictment, claiming, *inter alia*, that his admission to the psychiatric hospital in 1979 did not constitute a "commitment" to a mental institution within the meaning of 18 U.S.C. § 922(g)(4) because there was no judicial order of commitment. The district court denied the motion on March 17, 1992, finding, *inter alia*, that although § 922(g)(4) does not define the term "committed," Waters' commitment pursuant to New York State law was sufficient under federal policy. *United States v. Waters*, 786 F. Supp. 1111, 1113, 1116-17 (N.D.N.Y. 1992).

Waters next moved, on June 4, 1992, to dismiss his indictment on the ground that the current version of 18 U.S.C. § 922(g)(4) was enacted in 1986, seven years after his "alleged" commitment, and thus the indictment violated the *Ex Post Facto* clause of the United States Constitution. On July 10, 1992, this argument was rejected by the district court, which stated that the *Ex Post Facto* clause did not apply because the act for which Waters was indicted—i.e., the possession of the firearms—occurred after § 922(g)(4) became law.

Thereafter, on September 25, 1992, Waters signed a conditional plea agreement with the Government, agree-

ing to plead guilty to the first count of the five-count indictment, which charged as follows:

> On or about May 17, 1991, in the Northern District of New York, the defendant, LAURENCE WATERS, knowingly possessed a firearm in or affecting interstate commerce . . . having then previously been committed to a mental institution.

As part of the plea agreement, Waters preserved the right to appeal one issue, namely, "whether [his] involuntary hospitalization at the St. Lawrence Psychiatric Center from on or about November 7, 1979 constituted a 'commitment' as that term is used in [18 U.S.C. § 922(g)(4)]." The district court accepted his guilty plea to Count One of the indictment, following a plea colloquy, on September 25, 1992. On January 8, 1993, Waters was sentenced to serve a two-year term of probation, to pay a fine of $2,500 and a special assessment of $50, and to participate in a mental health treatment program as directed by the Probation Office. Waters filed a timely notice of appeal.

DISCUSSION

Waters' first argument upon appeal presents a novel issue for the Court: whether an involuntary hospitalization pursuant to New York Mental Hygiene Law constitutes a commitment to a mental institution within the meaning of 18 U.S.C. § 922(g)(4). Waters argues that his hospitalization pursuant to N.Y. Mental Hyg. Law § 9.27(a) (McKinney 1988) did not constitute a "commitment" within the meaning of 18 U.S.C. § 922(g)(4) because there was no formal commitment process or judicial order. The Government counters that New York's certification procedure for admission adequately constitutes a "commit-

ment" to a mental institution for the purposes of 18 U.S.C. § 922(g)(4).

The district court's interpretation of the term "commitment" to a mental institution under 18 U.S.C. § 922(g)(4) is reviewed *de novo* by this Court. *See United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991). The Gun Control Act does not define the term "commitment." *See* 18 U.S.C. § 922; *see also United States v. Giardina*, 861 F.2d 1334, 1335 (5th Cir. 1988). While determination of the issue of whether the appellant "was committed to a mental institution is a question of federal law," a reviewing court may "seek guidance from state law." *Giardina*, 861 F.2d at 1335; *see also United States v. Hansel*, 474 F.2d 1120, 1122-23 (8th Cir. 1973) (the court considered the mental health law of Nebraska in determining "commitment");[3] *cf. Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) ("Whether one has been 'convicted' within the language of the gun control statutes is . . . a question of federal . . . law, despite the fact that the predicate offense and its punishment are defined by the law of the State.") (citation omitted). Once state law has addressed the general question, the federal court must then consider if the outcome is consistent with federal policy. *See Giardina*, 861 F.2d at 1335.

The New York Mental Hygiene statute was enacted in 1927, *see* 1927 N.Y. Laws 981, and amended in 1933 to allow commitment upon the certification of two physicians and a hearing before a judge. 1933 N.Y. Laws 926, 931. The hearing requirement was abolished in 1964 and

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[3] The defendant in *Hansel* was charged with violating 18 U.S.C. § 922(h) of the 1968 Gun Control Act, which was incorporated into § 922(g) of the 1986 Gun Control Act. H.R. Rep. No. 99-495, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349.

replaced with a system of admissions procedures into hospitals or mental health facilities "which are initially medically-determined, but which are followed by notice and the opportunity for court review." Memorandum of Gov. Nelson A. Rockefeller, 1964 N.Y. Laws 1211, 1968. Section 9.27(h) of the statute states that "[i]f a person is examined and determined to be mentally ill, the fact that such person suffers from alcohol or substance abuse shall not preclude *commitment* under this section." (emphasis added). The change in the procedures instituted by the state legislature, and the retention of the term "commitment" in at least one section of the Mental Hygiene Law, suggests that the admission and retention procedures used by New York are meant to constitute a "commitment" into a mental health facility or hospital.

The New York State Mental Hygiene Law was amended in 1964 in order to recognize "the medical necessity of prompt treatment of psychiatric ills [while preserving] due process safeguards of every person who is admitted to a psychiatric facility for care and treatment." 1964 N.Y. Laws at 1968. Thus, the law was fashioned to allow the speedy and efficient care of mentally ill persons, upon the recommendations of both physicians and psychiatrists. In order to be involuntarily admitted to a mental health facility, one must be "mentally ill and in need of involuntary care and treatment." N.Y. Mental Hyg. Law § 9.27(a). A person is " 'in need of involuntary care and treatment' [if that] person has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he [or she] is unable to understand the need for such care and treatment." *Id.* § 9.01 (McKinney 1988 & Supp. 1994). In addition, the person must "pose[ ] a substantial threat of physical harm to herself or to others." *In re Jeannette S.*,

550 N.Y.S.2d 383, 384 (App. Div. 2d Dep't 1990) (mem.) (citations omitted). Section 9.27 allows for the involuntary admission of an individual based upon an application of a relative or other qualified person, and a two-physician certificate.[4] A psychiatrist must examine the person upon arrival at the hospital or mental health facility, and if it is found that involuntary treatment is appropriate, the person may be admitted. N.Y. Mental Hyg. Law § 9.27(e). Section 9.31(a) provides for a hearing for an involuntarily admitted patient upon request "at any time prior to the expiration of sixty days from the date of involuntary admission." Such hearing would occur in the "supreme court or the county court in the county designated by the applicant, . . . or if no designation be made . . . where [the hospital or mental health facility] is located." *Id.* § 9.31(b). Finally, § 9.33(a) requires that the director of a mental health facility obtain a court order authorizing the continued detainment of a patient within sixty days of the date of retention "if such patient does not agree to remain in such hospital as a voluntary patient." Thus, New York State provides an involuntarily admitted patient with "a rather elaborate procedural scheme for notice, hearing, review, and judicial approval of continued retention in a mental health facility."[5] *Goetz v. Crosson*, 967 F.2d 29, 32

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[4] A certificate signed by a physician or psychiatrist must

> show that the person [whose admission is sought] is mentally ill[,] and shall be based on an examination of the person alleged to be mentally ill made within ten days prior to the date of admission. . . . All certificates shall contain the facts and circumstances upon which the judgment of the physicians is based . . . .

N.Y. Mental Hyg. Law § 9.05(b).

[5] In fact, § 9.07(a) requires that a patient be given notice of her rights immediately upon admission. In addition, "upon the request of the patient or of anyone on the patient's behalf, the patient shall be permitted to communicate with the mental hygiene legal service and avail himself [or herself] of the facilities thereof." N.Y. Mental Hyg. Law § 9.07(a).

(2d Cir. 1992). This scheme has withstood challenges that it was facially unconstitutional. *See Project Release v. Prevost*, 722 F.2d 960, 971-81 (2d Cir. 1983). Section 9.23(a) provides for the conversion to voluntary status. There are also provisions and procedures for emergency admission. N.Y. Mental Hyg. Law § 9.39.

New York State caselaw, which refers to § 9.27 of the Mental Hygiene Law, supports the proposition that an "admission" under this section is, in fact, a "commitment." *See People ex rel. Powell v. Warden, Kings County Hosp.*, 422 N.Y.S.2d 726, 729 (App. Div. 2d Dep't 1979) ("Other statutory provisions [in Article 9 in addition to § 9.27] similarly provide for commitment without judicial involvement."); *Boggs v. NYC Health and Hosps. Corp.*, 525 N.Y.S.2d 796, 797 (1988) (New York Court of Appeals uses the term "commitment" when referring to § 9.27); *Fhagen v. Miller*, 328 N.Y.S.2d 393, 394 (N.Y.) (Changes to the Mental Hygiene Law were made "upon the recommendation of a special committee to study procedures for the commitment of the mentally ill."), *cert. denied*, 409 U.S. 845 (1972). In addition, our Court has used the term "commitment" when referring to § 9.27 of the New York Mental Hygiene Law. *See Goetz*, 967 F.2d at 31-32 ("A subject of a commitment proceeding may be committed . . . upon the application of a relative . . . and the certification of two examining physicians."); *Project Release*, 722 F.2d at 972 ("[s]ection[ ] 9.27 . . . permit[s] involuntary civil commitment").

Waters argues that because he was not " 'committed' by a mental health board, a commission, or by court order, but rather was 'admitted' by the medical decision of two physicians," he was not "committed" to a mental health facility within the meaning of the gun control statute. Thus, he argues, given the requirement that criminal

statutes must be "strictly construed" and that statutory terms be given their narrow meanings, *see Yates v. United States*, 354 U.S. 298, 310 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 18 (1978), he was not committed to a mental health facility. Waters relies primarily upon *Giardina* and *Hansel* to support his conclusion. In *Giardina*, the issue was "whether [the appellant's] involuntary hospitalization constituted a commitment to a mental institution under 18 U.S.C. § 922(g)(4)." 861 F.2d at 1335. The appellant in that case was hospitalized in 1984 under a Louisiana statute which allowed for detainment upon the certificates of two physicians. *Id.* at 1334. The appellant was held for treatment for two weeks, and then released. Under the provisions of the Louisiana statute, "involuntary detention beyond 15 days . . . must be [by] a judicial commitment." *Id.* at 1336. No judicial commitment ever occurred. The appellant pleaded guilty to violating § 922(g)(4) of the gun control statute. *Id.* at 1335. The Fifth Circuit vacated the conviction and sentence, holding that the appellant's involuntary hospitalization did not constitute a "commitment" under § 922(g)(4) because there was no formal commitment proceeding under Louisiana law. *Id.* at 1336-37.

The Eighth Circuit, in *Hansel*, addressed the same issue as the *Giardina* court: "whether the defendant's hospitalization . . . was a 'commitment' " under the federal gun control statute. 474 F.2d at 1122. In *Hansel*, a Nebraska mental health board "found the defendant to be mentally ill and in need of hospitalization and ordered him hospitalized." *Id.* Thereafter, he "was released from the hospital on 'convalescent leave' after two weeks, and was shortly thereafter formally discharged." *Id.* The Nebraska statute under which the defendant had been hos-

pitalized specified that "an individual may be *committed* to a hospital if . . . the superintendent of the state mental hospital determines that the individual is mentally ill and then certifies this determination to the County Board of Mental Health." *Id.* at 1123. This did not occur. The defendant was convicted of violating the gun control statute by purchasing a firearm after having been adjudicated a mental defective. *Id.* On appeal, the Government conceded that "the defendant was not committed because there was no compliance with [Nebraska law]." *Id.* at 1122. The Eighth Circuit reversed the conviction, finding that the defendant had not been "committed" under Nebraska law, and that the finding of mental defectiveness did not comport with the gun control statute. *Id.* at 1123, 1125. In so finding, the court stated that "[w]e can speculate that Congress desired to keep guns from all who had a history of mental illness and we might agree that such a policy would be desirable; but we can find no support for such a holding on our part." *Id.* at 1125 (footnote omitted).

Waters claims that his case is similar to both *Giardina* and *Hansel* because there was never any formal judicial "commitment" or adjudication of mental illness. He concludes that "there is no indication in the [federal gun control] statute . . . of an intent to prohibit the possession of firearms by a person who had been hospitalized under an *allegation* of mental illness . . . where no determination of mental illness requiring 'commitment' had been found."

We find Waters' arguments unpersuasive. If, in this case, the appellant's detention had required, under state law, a judicial proceeding in order to determine whether he was to be retained, and this had not occurred, then, as in *Giardina* and *Hansel*, his hospitalization would not

have constituted a "commitment." In *Giardina*, the law of Louisiana required that where the director of the mental institution wished to detain a patient for longer then the specified period, a judicial hearing was required. 861 F.2d at 1336. The hearing never occurred. *Id.* at 1334. Similarly, in *Hansel*, the defendant was released from a mental institution without a certification having been filed with the Mental Health Board, as was required by the Nebraska statute, and thus formal commitment was never completed. 474 F.2d at 1123. Here, under the applicable state statute, an involuntary admission can lead to an indefinite hospitalization if the patient chooses to convert her status to voluntary after sixty days. *See* N.Y. Mental Hyg. Law §§ 9.23(a) and 9.33(a). A formal judicial proceeding is required: (i) if a hospital or mental health facility wishes to continue an involuntary hospitalization and the patient fails to request conversion to voluntary status; (ii) when the patient requests a judicial proceeding prior to the expiration of sixty days from the date of involuntary admission; or (iii) when a relative, friend, or the mental hygiene legal service, on behalf of the patient, requests a judicial proceeding prior to the expiration of sixty days from the date of the patient's involuntary admission. *See id.* §§ 9.31(a) and 9.33(a). Here, Waters requested that his status be converted to voluntary status, and thus no formal judicial proceeding was required under New York State law. We conclude that, whether termed an "admission" or a "commitment," § 9.27 established "commitment" procedures under New York State law, and Waters was "committed" pursuant to those procedures.

Next, it must be determined whether this outcome is consistent with federal policy. Waters argues that the legislative history of the gun control statute demonstrates that Waters was not "committed" within the meaning of

the federal statute. The legislative history of the gun control statute states that it would be unlawful to possess a firearm under the statute if one has been formally committed pursuant to court order, H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4421, or committed by a mental health board or commission in jurisdictions where these bodies "constitute the adjudicating or committing authority." H.R. Rep. No. 1956, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4429-4430. The legislative history cited by Waters does not address admissions procedures into mental health facilities which, in New York State, are based on a medical determination of an individual's need for hospitalization.

In *Huddleston v. United States*, 415 U.S. 814 (1974), the Supreme Court stated that:

> The principal purpose of the federal gun control legislation . . . was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

415 U.S. at 824 (citation omitted). The federal gun control statute is designed to prohibit the ownership of firearms not only by individuals who have already committed dangerous acts, but also by those with a potential for violence as well. *See, e.g.*, 18 U.S.C. § 922(n) (prohibiting the possession of firearms by individuals under indictment, even though they are presumed innocent under the law); 18 U.S.C. §§ 922(g)(3), (g)(5), and (g)(7) (prohibits, respectively, the possession of firearms by unlawful users of controlled substances, illegal aliens, and citizens who have renounced their citizenship). A perusal of the legislative history of the statute indicates that

Congress would broadly apply the prohibition against the ownership of firearms by "mentally unstable" or "irresponsible" persons. *See* H.R. 17735, 90th Cong., 2d Sess. (1968), 114 Cong. Rec. 21780, 21791, 21832, and 22270 (1968).

We believe that the New York State system of involuntary admission under § 9.27, with its attendant requirements of notice and judicial proceedings, comports with federal policy. Under § 9.27(a), a person must be "in need of involuntary care and treatment" in order to be admitted. Such treatment is necessary when it is "essential to such person's welfare and whose judgment is so impaired that he [or she] is unable to understand the need for such care and treatment." N.Y. Mental Hyg. Law § 9.01. Thus, as we found in *Project Release*, § 9.27 permits only the involuntary confinement of dangerous individuals who cannot survive in the community. 722 F.2d at 973-74. The federal gun control statute was designed to prevent ownership of firearms by just such persons. *See Huddleston*, 415 U.S. at 824; *Dickerson*, 460 U.S. at 112. Here, Waters possessed a cache of firearms and a large quantity of ammunition and reported unsubstantiated strange "plots" to the ATF agents. Based upon the preceding analysis, we believe that it is wholly reasonable to conclude that, given the history of appellant and the fact that he gave evidence of having delusions, such a person, in possession of firearms, poses a grave and serious risk to the public at large. We believe this risk places appellant within the embrace of the prohibition Congress intended. The fact that he is no longer committed does not change this conclusion. "Congress made no exception for subsequent curative events. The past adjudication or commitment disqualifies . . . [because] such a person . . . [is] too much of a risk to be allowed firearms privileges." *Dickerson*,

460 U.S. at 116 (citation omitted). Several federal courts have held that the statutory restrictions of the federal Gun Control Act regarding possession of firearms apply to persons who have been committed to mental health facilities and are later released or found to be competent. *See, e.g., Redford v. United States Dep't of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 691 F.2d 471, 473 (10th Cir. 1982) (the prohibition of the federal gun control statute against those adjudicated mentally incompetent "provides no exceptions for people who have regained their competency or sanity or who have been released from confinement"); *United States v. Buffaloe*, 449 F.2d 779, 780 (4th Cir. 1971) (per curiam) ("We also conclude that the [federal gun control] statute is not unconstitutional as to [appellant] because 16 months later he was discharged from the hospital."); *United States v. Jones*, 569 F. Supp. 395, 398-99 (D.S.C. 1983) (finding that the statute did not unjustly punish persons who had been, at one point, adjudicated mentally ill).

In addition, the federal Gun Control Act provides "an administrative remedy to former mental patients." *Department of Treasury v. Galioto*, 477 U.S. 556, 559 (1986). Specifically, § 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary [of the United States Department of Treasury] for relief from the disabilities imposed by Federal laws . . . . [T]he Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability . . . are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose appli-

> cation for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial.

18 U.S.C. § 925(c) (1988 & Supp. IV 1992). Section 178.144, in Title 27 of the Code of Federal Regulations, describes the procedures by which one could petition for relief from the disabilities of 18 U.S.C. § 922(g). Thus, Waters could have petitioned, after this remedy was enacted in 1986, to be relieved from any disability under the federal Gun Control Act. *See Galioto*, 477 U.S. at 559. He did not do so.

In sum, then, Waters (i) was "committed" to a mental health facility under New York State law; (ii) his commitment comported with the policy of the federal Gun Control Act, which seeks to keep firearms out of the hands of potentially dangerous and irresponsible persons; and (iii) he had the opportunity, under the federal gun control statute, to avail himself of an administrative remedy to remove the disability of having once been committed to a mental health facility. Accordingly, we hold that the involuntary admission procedures of the New York Mental Hygiene Law constitute a "commitment" within the meaning of 18 U.S.C. § 922(g)(4), and Waters' conviction on this issue is affirmed.

The second issue raised by Waters on appeal is whether 18 U.S.C. § 922(g)(4), passed in 1986, can constitutionally be applied to his involuntary hospitalization in 1979, where he possessed firearms after 1986. We hold that the statute can be so applied. In the first place, the federal gun control statute punishes the *possession* and not merely the *acquisition* of a firearm. Thus, the fact that Waters was, at one time, a licensed dealer in firearms does not avail him

here, because possession is a continuing offense. *See Cody v. United States*, 460 F.2d 34, 35, 37 (8th Cir.) (court upheld application of a section of the federal Gun Control Act where the disqualifying status occurred before passage of the statute, but the prohibited *possession* occurred after the statute was enacted), *cert. denied*, 409 U.S. 1010 (1972); *von Eichelberger v. United States*, 252 F.2d 184, 185 (9th Cir. 1958) (the court, in discussing a violation of firearms regulations in the Internal Revenue Code, stated that possession is a continuing offense). In any event, Waters' *Ex Post Facto* claim was not properly preserved for appeal. Waters' plea agreement specifically reserved only the issue of whether or not he was "committed" within the meaning of 18 U.S.C. § 922(g)(4). It is well-established law in this Circuit that "in the absence of a court-approved reservation of issues for appeal, [a defendant pleading guilty] waives all challenges to the prosecution except those going to the court's jurisdiction." *Hayle v. United States*, 815 F.2d 879, 881 (2d Cir. 1987) (citing cases).

CONCLUSION

We have considered all of the issues raised by Waters on appeal and find them to be without merit. The judgment of the district court is affirmed.

APPENDIX C

CONSTITUTIONAL PROVISIONS

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or int he Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 94-19

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In the Supreme Court of the United States

OCTOBER TERM, 1994

LAURENCE G. WATERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's involuntary hospitalization constituted a commitment to a mental institution within the meaning of 18 U.S.C. 922(g)(4).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B18) is reported at 23 F.3d 29. The opinion of the district court (Pet. App. A1-A14) is reported at 786 F. Supp. 1111.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1994. The petition for a writ of certiorari was filed on July 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On a conditional plea of guilty, petitioner was convicted in the United States District Court for the Northern District of New York of possessing a firearm

after previously being committed to a mental institution, in violation of 18 U.S.C. 922(g)(4). Petitioner was sentenced to two years' probation. The court of appeals affirmed. Pet. App. B1-B8.

1. On May 8, 1991, after the Bureau of Alcohol, Tobacco and Firearms (ATF) received two letters from petitioner concerning the location of explosives and firearms, an ATF agent interviewed petitioner in his home. Pet. App. B3. During that interview, petitioner discussed subversive activities, espionage, and his affiliation with "the Company," a colloquial appellation for the Central Intelligence Agency. 786 F. Supp. at 1113. Petitioner also produced six rifles, three shotguns, one machine gun, and a large quantity of ammunition for the ATF agents' inspection. *Ibid.*

Subsequent investigation revealed that petitioner had been involuntarily hospitalized at a psychiatric institution and had remained at the hospital for nearly ten months during 1979 and 1980. Pet. App. B4. Consequently, petitioner's guns were seized, and he was indicted by a federal grand jury on five counts of possessing firearms after previously being committed to a mental institution, in violation of 18 U.S.C. 922(g)(4).

2. Prior to trial, petitioner filed a motion to dismiss the indictment, alleging that he had not previously been "committed" within the meaning of Section 922(g)(4). Section 922(g)(4) does not contain a definition of "committed." In his motion, petitioner relied upon *United States* v. *Giardina*, 861 F.2d 1334 (5th Cir. 1988), and *United States* v. *Hansel*, 474 F.2d 1120 (8th Cir. 1973), which held that certain procedures used for involuntary hospitalization in Louisiana and Nebraska respectively did not constitute commitment to a mental institution under Section 922(g)(4). Petitioner argued that his

hospitalization was not a commitment because it had not resulted from a judicial order. Pet. C.A. Br. 4.

The district court rejected petitioner's claim. The court first assessed whether petitioner's hospitalization was a commitment by reference to New York law. It found that petitioner had been "committed" pursuant to N.Y. Mental Hyg. Law § 9.27 (McKinney 1978),[1] notwithstanding the fact that his commitment was not pursuant to a court order. Pet. App. A6-A9. The court next determined that prosecuting petitioner under Section 922(g)(4) was consistent with federal policy. The court noted that petitioner had been considered a danger to society when he was involuntarily confined, and that Section 922(g)(4) was enacted "to keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." Pet. App. A12 (quoting *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 112 (1983)). The court denied petitioner's subsequent motion for dismissal of the indictment, which alleged that his prosecution violated the Constitution's Ex Post Facto Clause.[2] On September 25, 1992, petitioner entered a conditional plea of guilty to one count of violating Section 922(g)(4), reserving the right to appeal the district court's interpretation of Section 922(g)(4) and its ruling on his ex post facto claim. Pet. App. B5-B6.

3. On appeal, petitioner argued that under *Giardina* and *Hansel*, the commitment contemplated by Section

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[1] That Section provides, in pertinent part, "[t]he director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians."

[2] Petitioner does not renew his ex post facto claim before this Court.

922(g)(4) requires either a court order or a determination of mental illness by a mental board or commission. Pet. C.A. Br. 8-16. Like the district court, the court of appeals observed that in *Giardina* and *Hansel*, commitment procedures established by state law had not been followed. Pet. App. B11-B13. In contrast, the court of appeals found that state authorities had adhered to all procedures for commitment of petitioner under New York law. Petitioner was therefore properly subject to prosecution under Section 922(g)(4). Pet. App. B13-B17.

ARGUMENT

Petitioner claims (Pet. 5, 13-14) that the decision of the court of appeals conflicts with the decisions of the Fifth and Eighth Circuits in *Giardina* and *Hansel*. He argues that a person is "committed" within the meaning of Section 922(g)(4) only if he is confined pursuant to a judicial order or the authorization of a mental board or commission. Neither *Hansel* nor *Giardina* supports that proposition, however, and review by this Court is not warranted.

In *United States* v. *Hansel*, the Eighth Circuit held that the defendant's hospitalization, pursuant to an order of the County Board of Mental Health (Board), was not a commitment under Section 922(g)(4). 474 F.2d 1120 (1973). In that case, the defendant was hospitalized pursuant to Neb. Rev. Stat. § 83-328 (1971), which established a two-step procedure for admission to a mental institution. The statute first provided for the temporary hospitalization of an individual for psychiatric observation if the Board made a determination that such person was mentally ill and in need of hospitalization. The second step established procedures to be employed if the superintendent of the hospital determined, during the period of observation, that the patient should be

committed. Under the statute, the patient could be committed only if the superintendent certified his determination to the Board. Section 83-328 stated, in relevant part, that "[c]ommitment by the county board of mental health will be completed only when certification from the superintendent of the state hospital concerned is properly filed with the referring county board of mental health." *Hansel*, 474 F.2d at 1122-1123 n.4.

The defendant in *Hansel* was examined by a physician and was found not to have a serious mental disorder. He was released two weeks after his admission. Since the superintendent of the hospital never filed a certification with the Board—a statutory prerequisite for "commitment" under state law—the court found that the commitment procedure was never completed. The defendant's hospitalization was therefore "a period of *observation*" and was not a commitment under the Gun Control Act. 474 F.2d at 1123. Thus, *Hansel* did not hold that a judicial order is a prerequisite for commitment under federal firearms law. Rather, it held that a defendant will be deemed "committed" under Section 922(g)(4) only if state officials employ the procedures required for "commitment" under the law of that State.

In *Giardina*, the Fifth Circuit held that the defendant's hospitalization pursuant to emergency certificates issued by a physician and a coroner did not constitute a commitment to a mental institution under Section 922(g)(4). 861 F.2d at 1334. The defendant was admitted to the hospital for a period of two weeks, the maximum period of time that Louisiana law permitted a patient to be detained under the two executed certificates. La. Rev. Stat. Ann. § 28:53(A)(1) (West 1989). Section 28:53(B) allowed a physician to execute an emergency certificate if he determined that the individual was dangerous to himself or others; the statute also

authorized a director of a treatment facility to keep the patient for 72 hours. If the director wished to detain the patient beyond this 72-hour period, a second examination by the coroner and the execution of a coroner's certificate was required. Detention beyond 15 days specifically required a judicial commitment. 861 F.2d at 1336. Giardina, however, was released at the end of the initial two-week period and was never hospitalized again. *Id.* at 1334. On that basis the court of appeals concluded that his admission pursuant to an emergency certificate did not constitute a "commitment" under Louisiana law. *Id.* at 1337. Like the Eighth Circuit's ruling in *Hansel*, that decision was predicated on the fact that the state law concerning commitment, which required that a judicial order be obtained, had not been followed.

Hansel and *Giardina* stand for the limited proposition that a defendant who does not undergo procedures for commitment that conform with state law may not be considered "committed" for purposes of prosecution under Section 922(g)(4). Pet. App. B7. Here, New York commitment procedures were properly executed.[3] The

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[3] An involuntary admission under N.Y. Mental Hyg. Law § 9.27 (McKinney 1978) requires the certification of two physicians that an individual is mentally ill and in need of involuntary hospitalization. Judicial intervention is required only if (a) the patient requests a hearing to challenge the admission within the first 60 days, or (b) the director of the mental health facility determines that the admission must extend beyond the 60-day period and the patient does not waive the hearing by consenting to continued commitment. Under New York law, petitioner had a right to request a hearing concerning his involuntary hospitalization within 60 days of the date of his admission. *Id.* § 9.31(a). Petitioner made no such request. On the sixtieth day of his involuntary hospitalization, petitioner requested the director to convert his admission to voluntary status, and that request was granted. Involuntary hospitalization beyond 60 days requires a

decision of the court of appeals is therefore consistent with *Hansel* and *Giardina*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1994

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court order in New York only if the patient fails to request or is denied conversion to voluntary status. *Id.* §§ 9.23(a), 9.33(a). Petitioner was released from the facility where he was confined on August 27, 1980, almost ten months after his admission.

[4] As petitioner points out (Pet. 6-7), the Conference Report accompanying the Gun Control Act of 1968 makes clear that Section 922(g)(4) "does not require that there be prior action by a court inasmuch as mental boards and commissions constitute the adjudicating or committing authority in some jurisdictions." H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 30 (1968). Contrary to petitioner's contention, however, the legislative history does not suggest that Section 922(g)(4) requires action either by a court or by a mental board or commission if a particular State permits commitment to be effected in a different manner. Rather, that history reflects Congress's awareness that commitment procedures vary from State to State and that application of Section 922(g)(4) will therefore depend on state law.

Petitioner also argues at length (Pet. 15-20) that the court of appeals' decision rests on a misunderstanding of New York law. That state law question does not warrant this Court's review.